IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1016 OF 1988

Datta Jagannath Manera ...Appellant.

V/s

The State of Maharashtra ...Respondent.

Mr. Shirish Gupte with Mr. Prakash Naik for the appellant.
Mr. A.S. Shitole, APP for the State.

ALONG WITH
SUO MOTU PETITION 5 OF 1988

The State of Maharashtra ...Appellant.

V/s

Datta Jagannath Manera ...Respondent.

Mr. A.S. Shitole, APP for the State.
Mr. Shirish Gupte with Mr. Prakash Naik for the respondent.

CORAM: V.M.KANADE,J.

DATE: 31st March, 2005

ORAL JUDGMENT:

1. Appellant is the original accused who is challenging the Judgment and Order passed by the Sessions Court who has convicted him for the offence punishable under section 354 of the Indian Penal Code and 451 of the Indian Penal Code and has sentenced him to suffer R.I. for one year. Appellant - original accused is also convicted under section 451 and is sentenced to suffer R.I. for three months and to pay fine of Rs 1000/- and in default of payment of fine to

suffer one week R.I. The trial court, however, acquitted the accused of the offence punishable under section 376 of the Indian Penal Code.

2. Prosecution case, in brief, is that on 20/5/1986 the complainant's husband had gone to the factory for over time and was going to return back at about 11.00 P.M. The complainant had gone to the house of one Atmaram Gondhale at about 9.45 p.m. for taking tooth paste. After taking tooth paste, she went back to her house and noticed that the house was closed from inside. It is the case of the complainant that her daughter Monika and son Vijayendra were in the house. She knocked the door and waited for about 5 to 6 minutes. Thereafter, she pulled the chain of the door from the outside. At that time, she heard her son Vijayendra crying inside the house. The person who was inside the house stated who he was and that he was wearing Lungi. When the complainant went inside, she found that Monika was in a naked condition and noticed that semen were coming outside from her private part. She, therefore, summoned her neighbour Pramod Gondhale and showed the bed-sheet and semen on the person of Monika. By that time, her husband returned from his duty and she disclosed the matter to him and, thereafter, went to the Police Station and a complaint

was lodged. Her daughter Monika was then taken to the Civil Hospital and was examined by the Medical Officer. Panchanama was drawn. The bed-sheet and the sleeper of the accused was attached. The accused was arrested. He was examined by the doctor. Charge-sheet was filed against him. The articles were sent to the Chemical Analyser for analysis. The Trial Court, after going through the evidence on record, held that the offence under section 376 of the Indian Penal Code had not been established and, therefore, acquitted the accused of the said offence.

3. The Trial Court, however, found that the accused had committed an offence punishable under sections 354, 451 of the Indian Penal Code and sentenced him to suffer R.I. for one year and three months respectively.

4. Prosecution has examined 9 witnesses in support of its case. There was no eye witness to the said incident and the case of the prosecution was based entirely on the circumstantial evidence. The act of outraging the modesty has not been seen by the complainant and no other witnesses have been examined to prove the presence of the accused in the house of the complainant. P.W. 1 - Dr. Suresh Bhoite who

examined the accused has stated that the accused may or may not be able to do intercourse. P.W. 1 did not find any injury on the body and penis of the accused. There was no injury on the Testis scrotum. Prosecution, thereafter, examined P.W. 4 - Dr. Mahendra Chandrakant Nagre who examined Monika on the date of the incident at night and issued a medical certificate at Exhibit-18. Dr. Nagre had stated that he examined Monika and found that there were three small abrasion on Monika; one was below left eye, the other was near her chin and the third one was on the back below the shoulder and a small abrasion was near her private part. He also noticed stains of sticky material over near her private part. He has, however, stated that hymen was intact and there were no injuries over her private part and the patient did not show signs of vaginal penetration and, therefore, no rape has been committed. He has stated that the injuries were possible by human nail. In the cross-examination, he has admitted that the sticky material which was mentioned in his certificate at serial No.5 was sent to the Chemical Analyser through Police. He has also admitted that C.A. report at Exhibit-19 states that no semen was detected. Thus, from the medical evidence it can be seen that there were no injuries on the person of the prosecutrix.

There were no injuries on her private part. The sticky material which was found near her private part was not semen which is established by C.A's report at Exhibit-19. The four small abrasions on the body of the prosecutrix could have been caused by nail. From the evidence of the doctor who has examined the prosecutrix, it is difficult to come to the conclusion that there was molestation of the child.

5. Apart from medical evidence, the prosecution has relied on the evidence of mother of the prosecutrix - P.W. 5. Prosecution has also examined P.W. 2 - father of the prosecutrix and P.W. 6 - Pramod Gondhale. Prosecution has also examined three panch witnesses i.e. P.W.3 who has acted as panch witness for panchanama Exhibit-14, P.W. 7 - panch witness for panchanama of scene of offence and P.W. 8 for the panchanama of attachment of clothes on the person of the accused. Prosecution has also examined Investigating Officer P.W. 9 - Navnath Thorat.

6. P.W 5 who is the mother of the prosecutrix in her evidence has stated that she had gone to the house of Atmaram Gondhale at 9.45 p.m. and after she came back, she noticed that the accused was in the house and he opened the door after some time. She noticed

that the accused was wearing Lungi and was also wearing underwear. She also identified his underwear - Article No.2. She has stated that when she went inside, she noticed Monika in naked condition and also noticed semen coming outside from her private part. She reported the matter to Pramod Gondhale - P.W. 6. In her cross-examination, she has stated that she noticed the accused outside the house of Gondhale and she could not assign any reason why this fact was not mentioned in her complaint. She had also expressed her inability to explain why the presence of Vithabai, Kishore and the accused was not mentioned in the complaint. In the cross-examination a suggestion has been made that the accused belonged to rival political party and her husband belonged to political party which was opposed to the political party of the accused.

7. P.W. 6 - Pramod Janu Gondhale has stated that at about 10.30 p.m. in the night he heard that the complainant Rekha was shouting and she called him. Therefore, he went to her house and she showed semen on the person of Monika. P.W. 6 has stated that the complainant told her that the accused was involved in the matter.

8. It is not possible to accept the testimony of the complainant regarding presence of the accused in the house. There is no corroboration to her testimony about the presence of the accused in her house. P.W. 6 also does not state that he had seen the accused in the house of the complainant. Here, the statement that there was semen on the private part of the prosecutrix has not been proved as the Chemical Analyser's report clearly indicates that the sticky substance found on the private part of the prosecutrix was not semen. It is difficult to accept the version of the complainant that she had seen the underwear of the accused and was in a position to identify the underwear at Article-2. If accused was wearing Lungi, there was no way the complainant could have seen his underwear from the Lungi. From the cross-examination of the complainant number of things have come on record which indicate that the complainant has made number of improvements in her testimony. It has also been established that there was a political rivalry between the complainant's husband and the accused. The four abrasions which were found on the person of the prosecutrix can be self inflicted as they could have been caused as a result of nail scratches by the prosecutrix herself. The only other evidence on which the prosecution has relied is that of slipper which

was found in the house of the complainant. It is difficult to rely on this evidence for the purpose of coming to the conclusion that the accused was present in the house at the time when the incident in question had taken place. Even the finding of the Trial Court regarding the presence of the accused and his alleged involvement in the alleged offence of outraging modesty of the prosecutrix will have to be set aside. Thus, there is substance in the submission made by the learned counsel for the appellant. Thus, the prosecution has failed to prove beyond reasonable doubt that the accused had committed an offence punishable under section 354 and 451 of the IPC. No independent eye witness has been examined by the prosecution to prove the presence of the accused in the house of the complainant. There was admittedly a political rivalry between the family of the complainant and the family of the appellant. In view of all these circumstances, the accused is entitled to be given a benefit of doubt.

9. In the result, the following order is passed:-

O R D E R

. Appeal is allowed. The judgment and order of the Trial Court is set aside and quashed. The accused is acquitted of the offence punishable under sections 354 and 451 of the Indian Penal Code. His bail bonds to stand cancelled.

. Suo motu notice was issued by this court for enhancement of the sentence while admitting the criminal appeal No.1010 of 1988. For the aforesaid reasons given in appeal, suo motu petition for enhancement of the sentence is also dismissed and the rule is discharged.

V.M. KANADE, J.